



North Dakota Attorney General's LAW REPORT

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SENTENCE ENHANCEMENT - APPRENDI

In *Blakely v. Washington*, ____ U.S. ____ the court reversed Blakely's criminal judgment concluding that his sentence, imposed after a plea of guilty based upon facts not admitted by Blakely nor found by a jury, violated Blakely's 6th Amendment right to trial by jury and Apprendi v. New Jersey, 530 U.S. 466 (2000).

Blakely pled guilty in a Washington state court to kidnapping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months under the Washington sentencing laws. However, pursuant to state law, the sentencing judge imposed an exceptional sentence of 90 months after making a judicial determination that Blakely had acted with deliberate cruelty, a finding that was not admitted by Blakely nor found to have existed by a jury.

Applying Apprendi the court reaffirmed that any fact increasing the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Blakely was sentenced to more than three years above the 53 months statutory maximum of the standard range of sentence because the sentencing court found he acted with deliberate cruelty. A "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts but the maximum he may impose without any additional findings. When a judge inflicts punishment the jury's verdict alone does not allow, the jury has not found all the facts essential to the punishment and the judge exceeds his proper authority.

In this case, the sentencing judge could not have imposed the 90 month sentence solely on the basis of the facts admitted and the guilty plea. The state sentencing procedure did not comply with the 6th Amendment, and Blakely's sentence was invalid.

MIRANDA - SUPPRESSION OF ITEMS FOUND AS A RESULT OF A VOLUNTARY BUT UNWARNED STATEMENT

In *United States v. Patane*, ____ U.S. ____, the court held that failure to give a suspect Miranda warnings did not require suppression of the physical fruits of the suspect's unwarned but voluntary statements. The court concluded the Miranda rule protects against violations of the Self-incrimination Clause, which is not implicated by the introduction at trial of physical evidence resulting from voluntary statements.

The defendant was subject to a temporary restraining order. During an investigation of a violation of that order, it was learned that the defendant, a convicted felon, illegally possessed a pistol.

The defendant was arrested at his residence and the officer attempted to advise the defendant of

his Miranda rights but got no further than the right to remain silent. At that point, the defendant interrupted, asserting that he knew his rights, and there was no further attempt to complete the Miranda warnings.

The officer then asked the defendant about the pistol. Although the defendant initially was reluctant to discuss the matter, the officer persisted and the defendant told him the pistol was in his bedroom, giving permission to retrieve the pistol.

The defendant was indicted for possession of a firearm by a convicted felon, but the seizure of the pistol was suppressed.

Citing Dickerson v. United States, 530 U.S. 428 (2000), the Court of Appeals reasoned that Dickerson's announcement that Miranda is a constitutional rule was equated with the proposition that a failure to warrant pursuant to Miranda is itself a violation of the constitution and the suspect's 5th Amendment rights. The appeals court rejected the post-Dickerson views of other circuits that the fruit of the poisonous tree doctrine did not apply to Miranda violations in that suppression is not generally required in the case of negligent failure to warrant.

Reversing the Court of Appeals, the court explained that the Miranda rule is employed to protect against violations of the Self-incrimination Clause. The Self-incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. There is no justification for extending the Miranda rule to this context. The Miranda rule is not a code of police conduct and police do not violate the constitution or the Miranda rule by mere failure to warn.

The court reviewed the purpose of the Miranda rule. The rule was designed to protect the core privilege against self-incrimination. The possibility of coercion inherent in custodial interrogation unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated. To protect against this danger, the Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case-in-chief. Because these rules necessarily sweep beyond the actual protection of the Self-incrimination Clause, any further extension of the rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination.

The court has declined at times to extend Miranda even where it perceived a need to protect the privilege against self-incrimination. Statements taken without Miranda warnings, although not actually compelled, can be used to impeach a defendant's testimony at trial. The Miranda rule does not require the statements taken without complying with the rule and their fruits be discarded as inherently tainted. Such a blanket suppression could not be justified by reference to the 5th Amendment's goal of assuring trustworthy evidence, or by any deterrence rationale.

Furthermore, the Self-incrimination Clause contains its own exclusionary rule. Unlike the 4th Amendment's bar of unreasonable searches, the

Self-incrimination Clause is self-executing, prohibiting a person from being compelled in any criminal case to be a witness against himself. Those subject to coercive interrogation have an automatic protection from the use of the involuntary statements or evidence derived from their statements in any subsequent criminal trial.

The court noted that nothing in Dickerson, including its characterization of Miranda as announcing a constitutional rule, changes any of these observations. Nothing in Dickerson called into question the court's continued insistence that the closest possible fit be maintained between the Self-incrimination Clause and any rule designed to protect it.

Mere failure to give Miranda warnings does not, by itself, violate a suspect's constitutional rights or even the Miranda rule. The Self-incrimination Clause and the Miranda rule protect a fundamental trial right. Police do not violate a suspect's constitutional right or the Miranda rule by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by Miranda. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. At that point, the exclusion of unwarned statements is a complete and sufficient remedy for any perceived Miranda violation.

Unlike unreasonable searches under the 4th Amendment or actual violations of the Due Process Clause or the Self-incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is no reason to apply the "fruit-of-poisonous-tree" doctrine of Wong Sun v. United States, 371 U.S. 471 (1963).

In this case, the court of appeals, relying on Dickerson, wholly adopted the position that taking unwarned statements violates a suspect's constitutional rights. If this were the case, a strong deterrence-based argument could be made for suppression of the fruits of those statements. However, Dickerson's characterization of Miranda as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-incrimination Clause and any judge-made rule designed to protect it. There is no such fit in this case. Introduction of the non-testimonial fruit of a voluntary statement, such as the defendant's pistol, did not implicate the Self-incrimination Clause. The admission of such "fruit" presents no risk that the defendant's coerced statements, however defined, will be used against him at a criminal trial. In any case, the exclusion of

unwarned statements is a complete and sufficient remedy for any perceived Miranda violation. There is no need to extend, and no justification for extending, the prophylactic rule of Miranda to this context.

Because police cannot violate the Self-incrimination Clause by taking unwarned, though voluntary, statements, an exclusionary rule cannot be justified by reference to any deterrence effect on law enforcement. The court had previously rejected the application of the fruit-of-the-poisonous-tree doctrine of Wong Sun in Oregon v. Elstad, 470 U.S. 298 (1995) and Michigan v. Tucker, 417 U.S. 433 (1974). The

court would not apply Wong Sun to mere failures to give Miranda warnings in this case.

The scope of the Self-incrimination Clause is limited to testimonial evidence. The constitution itself makes the distinction. Although it is true that the court would require exclusion of the physical fruit of actually coerced statements, statements taken without sufficient Miranda warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. Miranda itself made clear that its focus was the admissibility of statements.

MIRANDA - QUESTION FIRST STRATEGY

In *Missouri v. Seibert*, ____ U.S. ____ the court affirmed the suppression of the defendant's statements regarding the death of a child.

The defendant's 12 year old son who had cerebral palsy died in his sleep. The defendant feared that she would be charged with neglect because of bed sores on his body. Two of her teenaged sons and two of their friends devised a plan, in her presence, to conceal the facts surrounding the child's death by incinerating his body in the course of burning the family's mobile home. They planned to leave a mentally ill teenager who was living with the family in the home to avoid any appearance that the child had been left unattended. The defendant's son and a friend set the fire and the mentally ill teenager died.

Five days later, the defendant was arrested. An officer made a conscious decision to withhold Miranda warnings resorting to interrogation technique he had been taught: question first, then give the warnings, and then repeat the question until the officer gets the answer the suspect has provided once before. After questioning, the defendant admitted her involvement in the fire and death. At that point, the officer turned on a tape recorder, gave the defendant Miranda warnings, and obtained a signed waiver of rights from her with a repeat of her earlier unwarned statements.

Although the trial court suppressed the pre-warning statement but admitted the response after giving the Miranda recitation, the Missouri Supreme Court reversed, finding that the interrogation was nearly continuous and the second statement, a product of the invalid first statement, should have been suppressed.

In affirming the suppression of the statements, the court recognized that Miranda was intended to reduce the risk of a coerced confession and to implement the Self-incrimination Clause. Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights. The failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting the waiver has generally produced a virtual ticket of admissibility. Maintaining that a statement is involuntary even though given after warnings and a voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda. The object of question-first is to render Miranda warnings effective by waiting for a particularly opportune time to give them after the suspect has already confessed. The threshold issue when interrogators question first and warn later is whether it would be reasonable to find that in the circumstances the warnings could function effectively as Miranda requires. Could the warnings effectively advise the suspect that she had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that she could choose to stop talking even if she had talked earlier? Unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with Miranda or for treating the second stage of

interrogation as distinct from the first, unwarned and inadmissible, segment.

By any objective measure, applied to the circumstances in this case, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. The reason “question-first” is catching on is as obvious as its manifest purpose - which is to get a confession the suspect would make if he understood his rights at the outset. The sensible assumption is that, with one confession in hand before the warnings, the interrogator can count on getting a duplicate with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. When Miranda warnings are inserted in the midst of coordinated and

continuous interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.

The court distinguished Oregon v. Elstad, 470 U.S. 298 (1985) by noting that the officer's initial failure to warn the defendant was an oversight and the officer did give the suspect Miranda warnings at the outset of a later and systematic stationhouse interrogation going well beyond the scope of the earlier unwarned prior admission.

In this case, the circumstances lead to a conclusion that a reasonable person in the defendant's shoes would not have understood the Miranda warnings and the continuation of the interrogation to convey a message that she retained a choice about continuing to talk. The facts do not support a conclusion that the warnings given could have served their purpose of reducing the risk a coerced confession would be admitted.

CONDITIONS OF PROBATION

In *State v. Ehli*, 2004 ND 125, 681 N.W.2d 808, the court held that a probation condition prohibiting a sex offender from having contact with his minor children was not a de facto termination of parental rights.

The defendant pled guilty to continuous sexual abuse of a minor and was sentenced to 12 years in prison with seven years suspended. He was prohibited, as a condition of probation, from having contact with minor children and from having access to the Internet. In a prior appeal, *State v. Ehli*, 2003 ND 133, 667 N.W.2d 635, the court vacated an earlier order relating to vacation of orders amending the defendant's probation conditions. The opinion did not preclude the state from seeking reinstatement of the original conditions of probation.

After remand, the state sought reinstatement of the original conditions of probation and the request was granted.

The defendant claimed he had a constitutional right to see his children and the conditions of his probation prevent him from doing so. He argued

that reinstating his probation condition was a de facto termination of parental rights and unconstitutional.

In rejecting this claim, the court recognized a parent-child relationship is of “constitutional dimension” but that right is not absolute and unconditional and may be curtailed or suspended if harmful to the child.

The defendant's rights concerning visitation of his children are not absolute. If the court determines continued contact would harm the children, the defendant does not necessarily have the right to visitation or contact.

In this case, the court found good cause for the “no contact” condition. The defendant continually sexually abused a seven-year-old female. He was living with the child's mother, developed a father-daughter relationship with the child, and the child called him “Dad.” The defendant used pornography from the Internet to instruct the child on certain adult sexual acts. The conditions were reasonably related to his probation.

CHANGE OF JUDGE - WAIVER OF APPOINTED COUNSEL

In *City of Fargo v. Habiger*, 2004 ND 127, 682 N.D.2d. 300, the court affirmed the defendant's conviction of disorderly conduct.

The defendant was arrested for disorderly conduct after an altercation between him and security personnel at a hospital. Prior to his first appearance in district court, the defendant wrote a letter to the district court, and his ex parte letters continued throughout the course of litigation.

The defendant first claimed the trial judge should have disqualified himself. The defendant wrote numerous letters to the court demanding the trial judge remove himself from the case, claiming he was biased, prejudiced, and a "tyrant." The court concluded the trial judge was under no obligation to withdraw as judge because the record did not reflect the judge had personal knowledge of the facts nor did the defendant demonstrate bias or prejudice sufficient to raise concerns about the judge's impartiality. In addition, the judge was not under a duty to withdraw because the defendant failed to properly demand a change of judge under N.D.C.C. § 29-15-21.

The defendant also argued he was not afforded his rights to counsel as guaranteed by the 6th Amendment, since he was not adequately advised of the dangers and disadvantages of self-representation.

The record established that several ex parte pre-trial communication letters were sent to the judge presiding in the case. After receiving several letters, the judge urged the defendant to seek advice of counsel. At his arraignment, the district court attempted to appoint counsel for the defendant but the defendant indicated he intended to proceed on his own.

Criminal defendants who proceed pro se must voluntarily, knowingly, and intelligently relinquish the benefits of counsel. In order for a waiver to be knowing and intelligent, the defendant should be made aware of the danger and disadvantages of proceeding pro se. The record must reflect satisfaction of two-part test employed to

determined whether a waiver of the right to counsel was effective: 1) whether the waiver was voluntary; and 2) whether the waiver was knowing and intelligent.

The first part of the analysis does not require the defendant to make an unequivocal statement. A defendant's behavior may rise to the functional equivalent of a voluntary waiver of the right to counsel. A manipulative pattern of obstructing the legal process is the functional equivalent of a voluntary waiver of right to counsel. The defendant was not a stranger to the legal system; the record reflected experience in hiring attorneys to represent him and he had also represented himself in the past. He repeatedly battled against the district court's attempt to appoint counsel. In addition, he specifically informed the court that he would employ counsel independently if he so desired and at the time of the trial he had been unwilling to provide the court with financial information to show he was qualified for court appointed counsel. These actions indicate the defendant's behavior was the functional equivalent of voluntary waiver of his right to an appointed attorney.

In the second part of the test, the court will analyze the record and the facts and circumstances of each case to determine whether the functional waiver was knowing and intelligent. To knowingly and intelligently waive a right to counsel, the defendant must be aware of the dangers and disadvantages of self-representation so the record establishes the defendant knows the choice is made with eyes open.

Repeated efforts by the judge during the defendant's court appearance and subsequent correspondence reflect the defendant knew of the dangers of self-representation but he chose to proceed without an attorney. The defendant's prior experience together with his behavior despite warnings from the district court that he could and should have representation indicate the defendant voluntarily intelligently waived his right to appointed counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL - HYBRID REPRESENTATION

In *Johnson v. State*, 2004 ND 130, 681 N.W.2d 769, the court affirmed the denial of Johnson's petition for post-conviction relief.

Ineffective assistance of counsel claims under the Strickland v. Washington standard, 466 U.S. 668 (1984), applies to post-conviction counsel. To succeed on a claim of ineffective assistance of

counsel under Strickland, a person must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. In his second post-conviction relief petition, Johnson argued his first post-conviction counsel was ineffective because she refused to file a brief on his behalf and failed to raise any issues other than those raised in a brief written by himself. His counsel stated she had not made any changes or additions to the brief he had written but had submitted Johnson's brief because ethical considerations precluded her from accepting a brief from a client with the instruction that she not change or alter the brief other than to make additions.

A criminal defendant either has a constitutional right to counsel or a constitutional right of self-representation. Under certain circumstances, a court may appoint standby counsel to assist a

defendant and to represent the defendant if termination of self-representation is necessary. A criminal defendant has no constitutional right to hybrid representation or to act as co-counsel with his attorney.

Johnson's allegations of ineffective assistance relate solely to his post-conviction attorney's failure to act as hybrid co-counsel in the proceedings, a type of representation to which Johnson was not entitled. Johnson had the option of either allowing his attorney to file a brief on his behalf or filing a brief on his own behalf. He could not demand filing and consideration of both briefs. Because Johnson had no right to demand his counsel file a brief in addition to the one he filed on his behalf, the court concluded, as a matter of law, that post-conviction counsel's performance did not fall below an objective standard of reasonableness.

RULE 3.2 - FAILURE TO FILE RESPONSIVE BRIEF - PROBATION SEARCH

In *State v. Krous*, 2004 ND 136, 681 N.W.2d 822, the court affirmed the trial court's order denying her motion to suppress attacking a probationary search.

As a result of a probation search, the state petitioned to revoke the defendant's probation. Under North Dakota Rule of Court 3.2, the defendant moved to suppress the evidence obtained in the search, arguing officers must first ask her permission to search and, if she withheld permission to search, her probation would be revoked. She argued the officers had no authority to perform a warrantless search of her residence if she denied them permission to search.

The state failed to respond to the defendant's motion to suppress. The defendant requested the trial court cancel the hearing and grant her motion to suppress under Rule 3.2 because the state failed to provide a timely brief in opposition to her motion.

The trial court allowed each side to present argument regarding the 3.2 issue at the hearing at the motion to suppress. The trial court ultimately allowed the state to present its case opposing the motion to suppress and determined that, while a nonresponse is acknowledgment the motion is

meritorious, it does not mean the motion must be granted. The probation search was upheld.

Rejecting the defendant's claim, the court noted that it is within the trial court's discretion to allow the state to put on evidence during the motion to suppress hearing and to consider the state's evidence when deciding the merits of the motion to suppress. The decision to allow hearing on a Rule 3.2 motion is discretionary even if the opposing party fails to file a brief.

The defendant argued the probation conditions requiring her to "submit" to a search as a condition of probation requires a person conducting a probationary search to first ask the probationer's permission to search. Rejecting this claim, the court held the condition of probation in this case that includes the word "submit" means the probationer consents to reasonable warrantless searches without any request for consent by officers. The defendant consented to having her 4th amendment rights limited when she accepted the conditions of probation. Requiring submission to search only when requested to do so would render the condition meaningless and would defeat the purposes of such conditions to deter further offenses by the probationer and to determine compliance with the terms of probation.

RESTITUTION

In *State v. Gill*, 2004 ND 137, 681 N.W.2d 832, the court affirmed the trial court's order requiring the defendant to pay \$4,120 in restitution.

The defendant was an assistant manager of a gaming operation and was charged with theft of property valued in excess of \$500. He pled guilty and received a deferred imposition of sentence. Following a restitution hearing, he was ordered to make restitution in the amount of \$4,120 with monthly payments to be determined by the probation officer based on the defendant's ability to pay.

The defendant argued that the district court erred in setting the amount of restitution at that sum.

The Supreme Court's review of a restitution order is limited to whether the district court acted within the limits set by statute, which is similar to the abuse of discretion standard. Although there must exist an immediate and intimate causal connection between the criminal conduct and the damages or expenses for which restitution is ordered, N.D.C.C. §12.1-32-08 does not specify the burden of proof required to establish restitution. Although the court has not addressed the question, other courts have overwhelmingly concluded that restitution may be based on facts

which are established by a preponderance of the evidence. The court concluded the state has the burden at a restitution hearing to prove the amount of restitution by a preponderance of the evidence.

The defendant claimed he took only \$1,000 and that other employees with access to the money must have taken the remainder of the missing funds. His employer claimed a total of \$5,120 had been taken during the relevant time period. The district court found the defendant had taken the total amount of \$5,120 and ordered him to make restitution of \$4,120, accounting for the \$1,000 he had returned to the police when he was called in for questioning. Video surveillance cameras did not record anyone other than the defendant taking money out of a safe. The court found sufficient circumstantial and direct evidence to support the restitution order.

The court also held the defendant bears the burden of proving inability to pay the restitution. The defendant neither claimed inability to pay nor offered any evidence of his financial resources in the district court, and he could not complain the district court erred in failing to consider his financial circumstances.

INVESTIGATORY STOP

In *State v. Decoteau*, 2004 ND 139, 681 N.W.2d 803, the court affirmed the defendant's conviction of several drug and paraphernalia offenses.

An officer recognized the defendant driving a vehicle. The officer had stopped the defendant one week previously and during that stop learned the defendant's license had been suspended. The officer initiated a traffic stop of the defendant's vehicle but did not run a computer check on the defendant's license status or observe any driving violation before stopping the vehicle.

During the stop, the officer asked the defendant whether his license was still suspended and the defendant admitted that it was. A computer check then confirmed the defendant's suspended license status and the defendant was arrested for driving under suspension. A search incident to arrest produced marijuana, empty baggies, and a scale.

The defendant moved to suppress all evidence resulting from the stop, arguing the officer did not

have a reasonable and articulable suspicion of criminal activity sufficient to support the stop. When the state failed to file a response to the motion, the defendant filed a "request for default" seeking suppression of the evidence and dismissal of the charges. The state then immediately filed a response to the motion to suppress and requested a hearing.

At the hearing, the state conceded its response to the suppression motion was two days late because the assistant state's attorney had erroneously believed there was an additional three days to respond after service by mail. The motion had been served personally and not by mail. The trial court advised counsel that as a sanction to the state's tardy response, the state would be bound by the facts as outlined in the defendant's brief but the state could submit a brief arguing the legal effect of those facts. The motion to suppress was denied, not on the merits, but because the defendant failed to file a factual affidavit in support of the motion. The defendant entered a

conditional plea of guilty, reserving the right to appeal the denial of his motion to suppress.

The defendant's notice of appeal stated the appeal was taken from an order denying his motion to suppress. An order denying a motion to suppress is not an appealable order under N.D.C.C. § 29-28-06. The court treated the defendant's attempted appeal from the order denying the motion to suppress as an appeal from the subsequently entered judgment.

The defendant claimed the officer's knowledge his license was suspended a week earlier was insufficient to create a reasonable suspicion the defendant's license was still suspended. He argued the officer acted on a mere hunch and was required to verify the defendant's suspended status through a computer check before stopping the vehicle.

Rejecting this claim, the court distinguished reasonable suspicion to conduct an investigatory stop with probable cause for an arrest. If the officer recognizes the driver and a computer check verifies the driver's license is suspended, the officer has more than a reasonable suspicion of unlawful activity; he has probable cause to arrest for the offense. Probabilities, not hard

certainties, are used in determining reasonable suspicion. When an officer observes a person driving a vehicle and the driver's license was suspended when the officer stopped him one week earlier, it is far from a mere hunch to suspect the driver's license is still under suspension.

The officer's suspicion is not rendered unreasonable merely because the driver's license may have been reinstituted in the intervening week. The reasonable suspicion standard does not require an officer to rule out every possible innocent excuse for the behavior in question before stopping a vehicle for investigation. The fact that a driver's license was suspended when he was stopped by the officer one week earlier would justify a reasonable person in the officer's position to believe the driver was engaged in unlawful activity when seen driving again one week later. Although, at some point, the length of time which has passed may render knowledge of a prior suspension too stale to support a reasonable suspicion of unlawful activity, in this case the officer's knowledge that the defendant's driving privileges were suspended at the time of a prior stop only one week earlier was not stale and created a reasonable suspicion of unlawful activity.

TESTIMONY - IMPEACHMENT

In *State v. Smestad*, 2004 ND 140, 681 N.W.2d 811, the court affirmed the defendant's conviction of forgery.

Constance Couch and the defendant were introduced by a mutual acquaintance in late December 2002. They dated less than a month and were married in January of 2003.

Prior to their marriage, the defendant informed Couch that he wanted to purchase a new pickup for her as a wedding present and persuaded her to write a check to a dealer for \$32,000 to purchase the pickup. On the same day, the defendant wrote Couch two personal checks, one for \$35,000 to cover the cost of the pickup and one for \$5,000. The bank refused to accept deposit of these checks and the defendant claimed he would have his accountant deposit the checks for Couch. The defendant drove Couch to a business called Route 94 Marketing and, while Couch waited in the vehicle, the defendant went into the business stating he would have his accountant make the necessary arrangements to have the checks deposited immediately.

The defendant never made arrangements to have the checks deposited and the \$32,000 check was returned for insufficient funds along with several checks written by Couch. The defendant told Couch he had a big settlement coming, that he was a major in the armed forces with a sizable income, and other misrepresentations relating to his employment and financial status.

Not surprisingly, Couch began to doubt the defendant's honesty. She reported checks were missing from her checkbook and suspected the defendant of taking them. The defendant was charged with forging two checks on Couch's checking account. At trial, the trial court refused to limit Couch's testimony regarding circumstances leading up to forging the checks and refused to allow the defense to impeach Couch on a misdemeanor bad check conviction.

The prosecution sought to allow the defendant's wife of five weeks to testify to a scheme perpetrated by the defendant in an effort to take money from Couch and others. The state argued

that Couch was deceived by the defendant and the defendant stole checks from her with intent to commit forgery.

A trial court is vested with broad discretion to decide if evidence is relevant and if its probative value substantially outweighs the danger of unfair prejudice. The district court's explanation for allowing Couch's testimony related to the forgery statute requiring the prosecution to prove a scheme or an attempt to defraud others. The district court examined the nature of the statutory language and determined Couch's testimony was necessary for the prosecution to establish an essential element of the crime. The statute requires the prosecution to demonstrate a scheme to defraud. Because checks were written on the account of a spouse, the district court recognized the state might need to show more to rebut any assumption the defendant had authority to write checks on his wife's account. In order to demonstrate there was a scheme with intent to defraud, the prosecution would have had to elicit

facts from the witness as to the defendant's actions causing financial harm to Couch. The essential elements of the statute require the prosecution to offer evidence to give context to the events surrounding the crime. The district court did not abuse its discretion when it ruled Couch could testify as to the events surrounding the forgery charges against the defendant.

The trial court also did not commit error when it refused to allow impeachment of Couch relating to her conviction of a class A misdemeanor offense of writing bad checks. The defendant failed to adequately show that Couch's crime was one that qualified for impeachment as involving dishonesty or false statement under North Dakota Rule of Evidence 609(a)(ii). The record did not reflect the crime of which Couch was convicted and with which the defendant wanted to impeach her. The scant record did not provide the court with an adequate basis to determine if Couch's crime was one which involved dishonesty under the applicable rule of evidence.

WORK RELEASE

In *State v. Sims*, 2004 ND 144, 683 N.W.2d 884, the court affirmed the defendant's conviction of theft and denial of a request for post-conviction relief, rejecting claims the defendant was denied work release while incarcerated.

The defendant claimed he pled guilty to a theft charge because he was assured by his attorney that he would be eligible for work release while incarcerated in a county correctional center. After his incarceration, he learned he was not eligible for work release because he was convicted of a felony. The guidelines governing work release were implemented and enforced by the county sheriff and preclude a person convicted of a felony from being eligible for work release. Sims claims he would not have pled guilty to the charge if he had been made aware by either his attorney or the state that he was not eligible for work release under the correctional center rules.

The defendant asserted on appeal that the sentencing court improperly delegated its sentencing authority to a nonjudicial officer, the county sheriff, in the determination of eligibility for work release. In the criminal judgment, the district

court stated the defendant would be eligible for work release during his actual incarceration pursuant to the rules and regulations of the jail administrator of the county correctional center, and the defendant argued the district court's delegation to set guidelines as to which inmates qualify for work release was improper.

Disagreeing with the defendant, the court noted that the ability of correctional facilities in North Dakota to establish guidelines for work release programs is governed by statute. The correctional facilities are provided with the power to determine measures which will maintain public safety and security, and these facilities may determine which categories of inmates qualify for work release. The correctional center maintained a written policy prohibiting felons from participating in the work release program. The defendant's failure to qualify for the work release program was not an unauthorized delegation of authority by the district court. The record reflected the defendant was warned by the district court at his sentencing that he might not qualify for the work release program and this failure would not affect his sentence.

JURY DEMAND - JUDGE RECUSAL

In *State v. Stockert*, 2004 ND 146, 684 N.W.2d 605, the court affirmed the defendant's conviction of disobedience of a judicial order, a class A misdemeanor.

The defendant's ex-wife was granted custody of their two minor children. Instead of returning the children after visitation, the defendant was found several days later in California with the children. The defendant was charged with violating the conditions of visitation found in several court orders.

The defendant was found guilty by a six person jury. The complaint was signed on May 3, 2001, and he moved for a jury of nine on May 23, 2001. On June 6, 2001, the defendant received a notice of assignment of judge, pretrial conference and trial and, within this notice, parties were informed that all pretrial motions would have to be served and filed within 28 days of the notice. The defendant received a copy of the notice on June 6, 2001. The district court, on June 15, 2001, informed the defendant his request for a jury of nine was improper. Twenty-eight days from June 6, 2001, would have been July 4, 2001. Because July 4, 2001, was a holiday, pretrial motions were to be served before July 5, 2001. The defendant made a demand for a jury of 12 on July 6, 2001, but it was not filed with the court until July 9, 2001. North Dakota Rule of Criminal Procedure 23(b) requires that the demand for a jury of 12 in a misdemeanor offense be filed with the clerk not later than the time set for making a pretrial motions. The defendant's demand for a jury of 12 was untimely. A second demand for a jury of 12 filed in September 2002, was also untimely and properly denied.

The defendant also claimed the trial judge should have recused himself from the case because he had a conflict of interest and prior knowledge of the case. He claims there was a conflict because his ex-wife's uncle was the trial judge's campaign manager.

The divorce case between the defendant and his wife was heard during a contested judicial campaign involving Judge Anderson. Judge Anderson was removed from the divorce case because the defendant filed a timely demand for change of judge and another judge was assigned to hear the divorce case. Judge Hilden was assigned to this criminal case and he was removed after the defendant filed a timely demand for change of judge. Thereafter, Judge Anderson

was assigned to the case as a result of that demand for change of judge. The defendant acknowledged receiving notice of Judge Anderson's appointment on June 6, 2001, and, on June 15, 2001, Judge Anderson ruled on various pending motions.

On July 12, 2001, the defendant filed an affidavit of prejudice against Judge Anderson, raising the issue of propriety of the judges sitting on the case alleging the judge had been removed from the divorce action because of the alleged conflict of interest, his ex-wife was a central figure in this prosecution, and his ex-wife's uncle had been Judge Anderson's campaign manager. He also asserted the judge was a witness in the case because he witnessed in chambers what transpired between two attorneys during a hearing and had prior knowledge of the case.

The presiding judge of the district denied the demand on the grounds that it was not timely and Judge Anderson did not recuse himself from the case.

The North Dakota Code of Judicial Conduct requires a judge to avoid impropriety and the appearance of impropriety. In addition, a judge is required to disqualify himself in a proceeding in which his impartiality might reasonably be questioned, if he has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

The defendant claimed the trial judge was a witness in the case because he witnessed in chambers what transpired between two attorneys in a civil contempt hearing. The rule against a judge having prior personal knowledge, however, applies only to knowledge learned from extra-judicial sources. When personal knowledge about a matter has been obtained by a judge within another legal proceeding, disqualification is not necessary.

The defendant also claimed the trial judge had a personal interest in seeing him suffer because he knew of the personal conflict. The defendant's claim of actual bias or prejudice was unsupported by the record and the law presumes a judge is not biased or prejudiced. The defendant claimed the trial judge denied every motion he had filed, but unfavorable rulings are insufficient to demonstrate bias.

The remaining question is whether Judge Anderson should have recused himself because the uncle of the defendant's ex-wife had been his campaign manager in a recently completed campaign in which Judge Anderson had been pitted against another sitting district judge for a single judgeship.

Even if a trial judge has not shown actual bias or prejudice and his personal knowledge of the facts and circumstances of the case came from a legal proceeding, disqualification can be essential to satisfy the appearance of justice. The primary concern is the preservation of public respect and confidence and the integrity of the judicial system.

When deciding whether or not to recuse, a judge must determine whether, in reasonable minds, the

conduct would create a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. A judge is disqualified whenever the judge's impartiality reasonably might be questioned. The court listed various relevant factors to be considered when deciding whether a trial judge's impartiality reasonably might be questioned because the defendant's ex-wife's uncle had been his campaign manager. In this case, the alleged conflict of interest was wholly unrelated to the factual and legal issues before the judge. This was not a case in which a party or party's attorney was involved in the judge's campaign or when the campaign was currently underway. Under the circumstances of this case, as reflected in the record, the judge's impartiality could not be reasonably questioned.

DUI - CONSENT TO TEST - JURISDICTION OF OFFICER

In *Johnson v. North Dakota Department of Transportation*, 2004 ND 148, 683 N.W.2d 886, the court affirmed the administrative hearing officer's suspension of Johnson's driving privileges.

A Mandan police officer stopped Johnson for speeding in the city limits shortly after 10 p.m. After speaking with Johnson, the officer smelled alcohol, noticed that Johnson's eyes were bloodshot, and performed field sobriety tests. Johnson was placed under arrest, read the implied consent advisory, and consented to submitting to a blood test. The officer drove Johnson to the Morton County Law Enforcement Center in Mandan for the blood test but upon arrival discovered that a nurse would not be available to administer the test until after midnight. The officer then drove Johnson to a hospital in Bismarck and asked a nurse there to withdraw blood from Johnson for the test.

On appeal, Johnson claimed that the blood test was not conducted in accordance with N.D.C.C. § 39-20-02 since the person drawing blood had not acted at the request of a law enforcement officer acting within that officer's jurisdiction.

N.D.C.C. § 39-20-02 requires a medically qualified person to withdraw blood for purposes of determining alcohol content only at the request of a law enforcement officer. Johnson claims that this statute requires the officer to have been physically located within his territorial jurisdiction when requesting the medical person to withdraw Johnson's blood and, since the officer was outside

the Mandan city limits when he requested the nurse to withdraw blood, he was not a law enforcement officer for purposes of requesting a blood test under the statute.

It was undisputed that the officer was a law enforcement officer with the Mandan Police Department and was acting within his jurisdiction and authority as a law enforcement officer when he stopped Johnson for speeding, conducted field sobriety tests at the location of the stop, arrested Johnson, read Johnson the implied advisory consent, and obtained Johnson's explicit consent to have a blood alcohol test. Johnson urged the court to adopt a hypertechnical construction of N.D.C.C. § 39-20-02 that the Mandan officer, under the circumstances, was not qualified to request a nurse in Bismarck to perform the blood test to which Johnson had given his consent while in the officer's territorial jurisdiction.

Rejecting Johnson's claims, the court concluded the clear and unambiguous purpose of the statutory language "at the request of a law enforcement officer" is to enable medical personnel to withdraw blood only at the request of a public servant authorized to engage in investigations for violations of law and not by an ordinary citizen. Under these circumstances, the court concluded the officer was a law enforcement officer within the legislative intent of the statute for the purpose of requesting the nurse in Bismarck to withdraw a blood sample from Johnson.

The court has recognized, as a general rule, a police officer acting outside his jurisdiction is

without official capacity and without official power to arrest. However, this case does not involve the authority of a law enforcement officer to make an arrest but the narrow issue of whether, under N.D.C.C. § 39-20-02, an arresting officer, who has obtained explicit consent of a suspect to have his blood tested while the officer and the suspect are located within the officer's jurisdictional territory, can transfer the arrestee outside the jurisdiction for the test. The statute does not require the blood test either be offered or administered within the jurisdiction where the arrest took place. The court concluded that under the circumstances, the officer did have authority under the statute to request performance of the test in Bismarck. This interpretation is consistent with case law of other jurisdictions recognizing that this type of evidence gathering activity by a law enforcement officer is not limited to the officer's limited territorial jurisdiction.

The court distinguished Davis v. Director, North Dakota Department of Transportation, 461 N.W.2d 420 (N.D. 1991), by noting that the issues and facts in Davis were substantially different from the issue and facts in this case. In Davis, the arrestee's refusal to take a blood alcohol test had

the direct consequence of the arrestee's driving privileges being suspended for an extended period of time. Because the officer was outside his jurisdiction when he requested the arrestee to submit to testing, the request was unauthorized and the arrestee's rejection could not constitute a refusal for purposes of automatic license suspension. In this case, the issue is whether an officer may request medical personnel to conduct a chemical test outside the officer's jurisdiction after the officer has obtained, within the officer's jurisdiction, the arrestee's consent to take the test. Only a hyper technical interpretation of N.D.C.C. § 39-20-02 would require the test itself be conducted within the officer's jurisdiction. Davis did not involve an interpretation of this section and the court's decision in Davis did not require the interpretation of the statute as proposed by Johnson.

The court held that under N.D.C.C. § 39-20-02 a law enforcement officer who effectuates a proper arrest and consent of the suspect to take a blood test within the officer's territorial jurisdiction can, while outside the officer's jurisdiction, request a qualified medical person to conduct the test.

ARREST - USE OF FORCE - APPEAL TRANSCRIPT

In *State v. Mathre*, 2004 ND 149, 683 N.W.2d 918, the court affirmed the defendant's conviction of assaulting a peace officer, preventing arrest, and escape.

Officers responded to a report of an unwanted individual on the premises. When officers arrived, the defendant mooned them and officers attempted to place him under arrest for disorder conduct. The defendant resisted and a scuffle ensued between him and the officers resulting in the offenses of which he was convicted. He also was cited in municipal court for disorderly conduct, but his conviction was overturned when the court concluded it could not find an "obscene gesture" under the Minot city ordinance and the ordinance was void and enforceable because it did not conform with North Dakota state law.

The defendant raised numerous issues on appeal but the court's ability to review those claims was limited because he had not provided a transcript. It is the appellant's responsibility to provide a transcript on appeal and he must suffer any consequences resulting from the lack of a transcript to review.

The court rejected the defendant's claim that he had a right to resist his arrest since he was acquitted of the disorderly conduct charges that provided the basis for his arrest. Notwithstanding his arguments to the contrary, the court noted the defendant's claims regarding the unlawfulness of his arrest applied only to his conviction for preventing arrest or discharge of other duties. However, unlawful police conduct is not an absolute defense to a charge of preventing arrest and a defendant is allowed to resist only if excessive force is used to effect the arrest. In this case, the trial court did not instruct the jury regarding the statutory defense to preventing arrest or discharge of other duties and the defendant did not request any jury instructions or object to the instructions given.

The material facts leading to the defendant's arrest for disorderly conduct were not in dispute. Whether the officers were acting lawfully and under color of law depends upon whether the officers' observations reasonably indicated to them that the defendant had committed the crime of disorderly conduct in their presence. Clearly, the defendant's conduct was sufficient for the officers to reasonably believe he had committed

the crime of disorderly conduct in their presence. Although the defendant was acquitted of the disorderly conduct charge, an arrest does not become unlawful merely because there is no subsequent conviction of the crime for which an individual is arrested. Without benefit of a transcript to review, the court must infer the defendant failed to provide evidence indicating the officers were not acting lawfully and therefore the trial court did not err by not submitting the question to the jury.

In addition, the defendant's argument failed to recognize the applicable law when force is used to resist arrest. Although there was a right under the common law to use force against a public official attempting to make an unlawful arrest, the history of this statutory provision proposed to do away with the privilege to use force to resist an arrest by a public servant. Even if the court assumed the officers were acting unlawfully, the defendant's right to forcefully resist the arrest was limited by N.D.C.C. § 12.1-05-03(1) and he was not entitled to use force unless excessive force was used by the officers.

The defendant claimed the officers used excessive force, entitling him to forcefully resist the arrest. The jury was properly instructed regarding self-defense and the use of force in resisting arrest. By finding the defendant guilty of the crimes charged, the jury's verdict can only be interpreted as finding the officers did not use excessive force, and that the defendant was not justified in using force to resist the arrest.

The court also rejected the defendant's claim that the record did not support his convictions. To preserve an issue of sufficiency of the evidence in a jury trial, the defendant must move the trial court for judgment of acquittal under North Dakota Rule of Criminal Procedure 29. The state provided a partial transcript indicating the defendant did not move for judgment of acquittal at the close of the state's case or after the presentation of all the evidence. Therefore, the issues regarding the sufficiency of the evidence have not been preserved for appeal.

SEARCH INCIDENT TO ARREST

In *State v. Berger*, 2004 ND 151, 683 N.W.2d 897, the court affirmed the defendant's conviction of possession of drug paraphernalia, concluding the officer had probable cause to arrest the defendant and a search incident to that arrest was valid.

An officer was following a van driven by the defendant. The officer noticed the defendant was tailgating the vehicle in front of him and that the van almost struck the vehicle as it turned off onto a side street. The officer noticed the defendant's van weaving within its lane, crossing over and straddling the yellow line dividing the traffic from the turning lane. At that point, the officer activated his overhead lights and stopped the defendant's vehicle.

The defendant greeted the officer with profanity and became verbally abusive. Another officer arrived to assist and the defendant became more belligerent. The defendant was very aggressive, could not stand still, paced back and forth, was very nervous and his whole body was shaking. The officer administered a field sobriety test and the defendant passed the one-legged stand test. On the HGN test, the defendant exhibited two clues of nystagmus. The officer then performed a light reactivity test that measures the eyes' reaction to light. The officer noticed before the

test that the defendant's eyes were glossed over, watery, and fully dilated. When light was shined into the defendant's eyes, his pupils reacted very, very slowly and stayed dilated.

The officer arrested the defendant for driving under the influence of drugs. A subsequent search incident to arrest produced a digital scale, pen tube, tinfoil, spoon, and a glass vial with methamphetamine residue, the defendant was charged with possession of drug paraphernalia. The trial court denied the defendant's motion to suppress evidence found during the traffic stop.

The sole question presented on appeal was whether the officer had probable cause to arrest the defendant for driving under the influence. When determining whether an officer had probable cause to arrest, the court reviews the facts and circumstances known by the officer and applies a totality-of-the-circumstances standard. To establish probable cause, an officer does not have to possess knowledge of facts sufficient to establish guilt, all that is necessary is knowledge that would furnish a prudent person with reasonable grounds for believing a violation has occurred. Even though conduct may have an innocent explanation, probable cause is the sum of information and the synthesis of what police

have heard, what they know, and what they observed as trained officers.

In determining what was necessary to establish probable cause to arrest a driver for driving while under the influence of drugs, the court is guided by cases evaluating what is necessary to arrest a driver for driving while under the influence of alcohol. Appropriate standards for evaluating probable cause to arrest for driving while under the influence of drugs applies a two-part test: the statute requires the driver be capable of driving safely and it requires the person be under the influence of drugs. To have probable cause to arrest for driving under the influence of drugs, the officer must first observe some signs of physical or mental impairment and, second, have reason to believe the defendant's impairment is caused by drugs.

In this case, several facts in the record demonstrated the defendant's physical and mental faculties were no longer in their natural or normal condition and the defendant did not possess the clearness of intellect and control of himself that he would otherwise have.

Erratic driving was a factor indicating impairment which may be relevant in determining whether probable cause exists to arrest for driving under the influence of alcohol or drugs. Belligerent, aggressive, and abusive conduct, and use of profanity, are relevant factors indicating

impairment. Unusual nervousness and severe shaking indicate the person's physical faculties are not at a normal state and the person does not have normal control of himself. There are relevant factors in assessing probable cause to arrest. Glossy or watery eyes indicate impairment and may be a relevant factor in determining probable cause to arrest for driving under the influence of drugs. Failing a field sobriety test also is a relevant factor to be considered. Although the officer did not notice an odor of alcohol emanating from the defendant, when a driver exhibits a significant level of impairment and alcohol usage has been tentatively eliminated as a cause of the impairment, it is reasonable to conclude the driver is under the influence of drugs or another substance.

Under these facts and circumstances, considered in totality and in light of the officer's training and experience, the officer had probable cause to believe the defendant was driving under the influence of drugs. Although each factor individually might be insufficient to establish probable cause, the cumulative effect is sufficient. The officer observed signs of physical or mental impairment and had reason to believe the defendant's impairment was caused by drugs. The trial court did not err in determining there was probable cause for arrest and denying the motion to suppress evidence discovered during the search incident to an arrest.

RIGHT TO COUNSEL - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Ernst v. State*, 2004 ND 152, 683 N.W.2d 891, the court affirmed the trial court's order dismissing an application for post-conviction relief.

Ernst pled guilty to several felony and misdemeanor offenses arising from evidence found in a search of his home in Minnesota conducted by Minnesota police officers executing a Minnesota search warrant authorized by a Minnesota judge. At sentencing, the state recommended five years imprisonment with two years suspended and, after informing Ernst that the state's recommendation was nonbinding, the trial court sentenced him to eight years imprisonment with three years suspended for six offenses. One additional year of imprisonment was imposed for an indecent exposure charge.

In his application for post-conviction relief, Ernst claimed that he received ineffective assistance of counsel, asserting his counsel failed to move to

suppress evidence, that his attorney coerced him into accepting a plea of guilty erroneously advising him of the potential maximum sentence he could received, and that Ernst misunderstood the consequences of his guilty plea.

The petitioner for post-conviction relief has the burden of establishing a basis for relief. A defendant may not withdraw an accepted guilty plea unless withdrawal is necessary to correct a manifest injustice. A defendant who pleads guilty upon the advice of counsel may only attack the voluntary intelligent character of the guilty plea. When counsel represents the defendant during a plea process and the defendant relies on counsel's advice when entering his plea, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.

Under the 6th Amendment, a defendant has a fundamental right to counsel during all critical stages of prosecution. The entry of a guilty plea, whether to a misdemeanor or a felony charge, is a critical stage.

Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The petitioner has the heavy burden of proving the counsel's assistance was ineffective, must specify how the counsel was deficient, and specify the probable different result. A petitioner will not succeed on an ineffective assistance of counsel claim unless he proves counsel's performance was so deficient as to fall below an objective standard of reasonableness and the deficient performance was prejudicial. A defendant, to meet the prejudice requirement, must establish a reasonable probability that, but for this counsel's errors, the result of the proceeding would have been different.

The court concluded that Ernst failed to demonstrate any legal theory that would require suppression of the evidence obtained during the Minnesota search nor, had counsel moved to suppress that evidence, a reasonable probability that he would not have pled guilty. Although the outcome of the motion may, as Ernst claimed, be unknown, ineffective assistance of counsel claims for counsel's failure to move to suppress evidence at a suppression motion hearing must be premised on actual, not possible, prejudice to the defendant. The record also established that Ernst did not misunderstand the consequences of his guilty plea and no evidence, other than Ernst's claims that he was coerced by his attorney's erroneous advice that, if found guilty of all charges, he could receive more than 14 years imprisonment. He also failed to establish how this potential sentence was legally incorrect.

SEARCH AND SEIZURE - CONSENT

In *State v. Mitzel*, 2004 ND 157, ____ N.W.2d ____, the court reversed the trial court's order denying the defendant's motion to suppress.

Officers went to the defendant's apartment to investigate a report of domestic abuse. A neighbor reported people in the defendant's apartment had been yelling, and banging noises were heard. The officer testified he knocked on the defendant's door and explained that he was there to investigate a domestic disturbance. The defendant let him in the apartment after the officer asked whether the defendant minded if he came inside.

The defendant told the officer he was arguing with his girlfriend and that both of them were all right. The defendant asked whether he would like to talk to his girlfriend and the officer stated he would.

The defendant then began walking to the back bedroom and stated that he would get her. The officer told the defendant he would come with him for his safety. The defendant shrugged and began walking toward the back bedroom.

The officer testified that as he was walking toward the bedroom, he detected the odor of marijuana and, when the defendant opened the bedroom door, the odor of marijuana was strong and distinguishable. A female in the room yelled "you can't be here" and the bedroom door was

slammed shut. The officer then pushed the door back open and told the girl to come out.

The defendant admitted to smoking marijuana but refused consent to search the bedroom. The officer left to apply for a search warrant but was later informed the defendant had consented to a search.

Another officer volunteered to assist with the case and arrived after the first officer left to obtain a search warrant. The officer told the defendant it may be a while to get the search warrant because the state's attorney was busy and they were going to have to wait. The defendant stated he did not want to wait any longer, and he and the girl gave a written consent to search.

In his motion to suppress the defendant claimed he did not give consent for police to follow him to the rear of his apartment, there was no exigent circumstances to justify the search, and his later consent to search was obtained in violation of his Miranda rights and was involuntary. His motion to suppress was denied.

In reversing the trial court's order denying the motion to suppress, the court concluded the trial court's findings were insufficient to show a consent.

Warrantless searches inside a person's home are presumptively unreasonable. Searches inside a home are not unreasonable if the search falls under one of the exceptions to the search warrant requirement. When no exception exists, the evidence obtained must be suppressed as inadmissible under the exclusionary rule. It is the state's burden to show that a warrantless search falls within an exception to the warrant requirement. One of these exceptions to a warrantless search is consent.

The existence of consent is a question of fact to be determined from the totality-of-the-circumstances. The scope of consent is measured objectively by what a reasonable person would have understood by the exchange between the police and the suspect. In cases involving consent to enter a home, to sustain a finding of consent the state must show affirmative conduct by the person alleged to have consented that is consistent with giving consent rather than merely showing the person took no affirmative actions to stop the police. Outside the context of consent to enter a home, it has been found that if police do not request consent, expressly or impliedly, consent cannot reasonably be implied from silence and failure to object. Although it has been held that consent cannot be implied from silence or failure to object, in limited cases, consent can be implied. Failing to object to the continuation of a consent search makes the continued search objectively reasonable.

This is not a case in which the defendant failed to object to the officers following him down the hall or in which the officer requested consent. Rather, the officer did not ask for the defendant's consent but made a statement of authority that he was coming with the defendant for the officer's safety. In response to this statement, the defendant shrugged and walked back to the bedroom. Mere acquiescence to police authority is insufficient to show consent.

Even if the officer's statement could be interpreted as asking the defendant for consent to search, a reasonable person would not believe the defendant's conduct showed consent. In determining whether a suspect has consented to an officer's request to search, the question is not subjective but is whether a reasonable person would believe the conduct showed consent. Consent should not be lightly inferred and must be proven by clear and positive testimony. Consent must be unequivocal. A shrug is ambiguous and it can express aloofness, indifference, or uncertainty.

Another exception to the warrant requirement is exigent circumstances, meaning an emergency situation requiring swift action to prevent imminent danger to life, serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. The court will apply a de novo standard of review to determine whether the facts constitute exigent circumstances.

Although domestic disputes can be explosive, there were insufficient specific facts in this case to indicate an immediate search of the apartment was warranted. Although a neighbor reported banging and yelling coming from inside the defendant's apartment, there was no disturbance in progress when the officers arrived and the defendant informed the police that he and his girlfriend had had a fight and that they were both fine. There was no testimony that the defendant was trying to prevent the police from entering the apartment or that he was being evasive. There was no testimony that the defendant had violent tendencies or initial signs of intoxication. There was also no testimony to indicate the defendant was agitated and no evidence of any altercation such as blood, bruising, or raw knuckles. The circumstances were insufficient to show exigent circumstances.

Because the facts do not show an emergency requiring swift action to prevent imminent danger to life or property, exigent circumstances did not justify the search of the defendant's apartment. The officer's action in following the defendant through his home constituted an unlawful search and all evidence obtained from the warrantless search must be suppressed as inadmissible under the exclusionary rule.

The court also concluded that the subsequent written consent to search was not valid. Whether a consent to search is voluntary is a question of fact. A trial court must determine whether, under the totality-of-the-circumstances, the consent was voluntary. The government has the burden to prove that consent was voluntarily given.

When consent is the product of a free and unconstrained choice and not the product of duress or coercion, it is voluntary. To determine voluntariness, the court focuses on two elements; first, the characteristics and condition of the accused at the time of the consent and, second, the details of the setting in which the consent was obtained with no one factor being determinative.

It did not appear the trial court considered the totality-of-the-circumstances. The decision was based solely on the fact the defendant signed a consent as a result of having been informed that it would take a few hours to obtain a search warrant.

Before the defendant consented to the search without the benefit of a Miranda warning, he was told the officers would get a search warrant but that it might take a while and would be time consuming. A lack of a Miranda warning, by itself, does not invalidate a consent to search. Stating that a search warrant will be obtained is also insufficient to render consent involuntary.

When the defendant consented to the search he had been arrested and was in handcuffs. Because all the evidence obtained from the initial search must be excluded under the exclusionary

rule, there was no basis for his arrest. The mere fact that a person has been arrested in violation of his constitutional rights casts grave doubts upon the voluntariness of a subsequent consent. The defendant was not given his Miranda warnings until after he had consented to the search. Miranda warnings are a factor to consider under the voluntariness test. A Miranda warning cannot support voluntariness of a consent when it is given after the consent.

Although the trial court found the defendant's written consent to search was valid, that determination was based upon an incorrect application of the law. The matter was remanded for determination of whether the defendant's consent was voluntary under the totality-of-the-circumstances.

APPOINTMENT OF COUNSEL - WITNESS SUBPOENAS

In *State v. Hilgers*, 2004 ND 160, ____ N.W.2d ____, the court affirmed the defendant's conviction of removing or detaining a child in violation of a custody decree.

The defendant claimed the trial court erroneously determined he was not indigent and did not qualify for court appointed counsel at public expense.

The court noted there is no legal reason to appoint counsel for someone who can afford and obtain his own. Before counsel will be appointed, a defendant has the burden of establishing he is indigent and qualifies for appointment of counsel.

The trial court removed the defendant's appointed counsel, finding the defendant was not indigent based on an income of \$31,000 gross per year and the defendant's claim that he transferred real estate to his children without consideration. Under the indigent defense procedures and guidelines, the trial court, when determining indigency, should consider any indication of anticipatory transfer of assets by a defendant to create the conditions for eligibility for defense services. Such a transfer should be scrutinized and dealt with decisively.

In his application for court appointed counsel, the defendant stated he earned \$31,000 per year. An individual with no dependents is eligible for indigent defense services if his annual gross income is at or below \$11,075. To be eligible under the guidelines for appointed defense services, he would have to have at least 7

persons in his household based on his listed income of \$31,000 per year. Reviewing the record, the court noted that though the defendant claimed he transferred the property to his children, he alluded to the fact he retained control over the property, and documents existed showing tax payments made on the property. Together with the listed income and other information contained in the application, these established the defendant did not meet his burden of proving indigency.

The defendant also claimed he was denied the issuance of several requested subpoenas to procure witnesses in his favor at trial. The court has stated that the 6th Amendment right to compulsory process for obtaining witnesses is not an absolute right and the defendant must show that testimony would have been both favorable and material to his defense. Whether a district court's refusal to issue a subpoena violates the 6th Amendment is a question of law, and the court's standard for review for a claimed violation of a constitutional right is de novo.

The trial court informed the defendant prior to trial that he may petition the court ex parte for subpoenas of certain parties as witnesses at trial and the court would sign the subpoenas if the defendant could show that the witnesses would have relevant testimony to give in his defense. He would also have to request, because of financial hardship, that the witness fees and service fees be paid by the state. A copy of North Dakota Rule of Criminal Procedures 17 was also sent to the

defendant along with a sample subpoena to assist in his efforts.

The trial court ordered the issuance of several subpoenas requested by the defendant. The court also stated that although the defendant would be responsible for the expenses associated with the service and execution of the subpoena, the expenses would be paid by the court to insure the witnesses would be paid the expenses. One subpoenaed witness raised an objection to the subpoena prior to the trial but the trial court still ordered her to appear, stating he would provide her with any expenses and witness fees.

In another order, the trial court denied four subpoenas, stating the subpoenas were not in compliance with Rule 17.

It did not appear to the court, based on the record, that the subpoenas were denied because the defendant was unable to afford witness fees and costs. The trial court advised the defendant he would need to comply with the requirements of Rule 17 and, when the trial court determined he had not, it denied several subpoenas.

The defendant was afforded due process despite the trial court's refusal to issue several of his requested subpoenas. A trial court is not obligated to issue every subpoena requested by a defendant.

SEARCH AND SEIZURE - MOTOR VEHICLE SEARCH - MIRANDA

In *State v. Haibeck*, 2004 ND 163, ____ N.W.2d ____, the court reversed the trial court order that had granted suppression of evidence obtained after a motor vehicle search.

The defendant was a passenger in a vehicle stopped for speeding. The officer detected the odor of alcohol after he approached the vehicle. The driver, who was 19, failed a field sobriety test and was cited for minor in consumption or possession of an alcoholic beverage, and speeding. The officer informed the driver that he would search her vehicle incident to her arrest.

The officer then approached the defendant and removed her from the vehicle, placing her in the patrol car for questioning after returning the driver to her vehicle. The officer testified that he continued to detect the odor of alcohol while speaking with the defendant and, upon questioning, the defendant admitted to drinking. She was 18 years old at the time of the stop.

While questioning the defendant, after another officer had searched the driver's vehicle, the officer noticed a necklace around the defendant's neck that appeared to be a marijuana pipe and questioned her about it. The defendant confirmed it was used for marijuana. The officer detected the odor of marijuana emanating from the necklace and noticed that it contained fresh residue.

After speaking with the defendant further, the officer conducted a second search of the vehicle and found a razor and plastic vial with methamphetamine residue inside the defendant's

purse. Marijuana was also found. The defendant confirmed the presence of the controlled substances. No Miranda warnings were given to the defendant after her arrest.

The trial court suppressed all evidence, finding the defendant had not been properly advised of her Miranda warnings during a police investigation.

The automobile exception to the search warrant requirement allows officers to search the belongings of passengers and driver alike. If probable cause justifies the search of a lawfully stopped vehicle, it justifies a search of every part of a vehicle and its contents that may conceal the object of the search. The violation of the speed limit supported the officer's stop of the vehicle. Once the officer approached the vehicle, he detected the odor of alcohol and learned that both the driver and the defendant were under the legal drinking age. The officer had also recognized the defendant from an arrest for underage alcohol violations several days earlier. A police officer may draw inferences based on his own experience in deciding whether probable cause exists. Both the driver and the defendant smelled of alcohol and each admitted drinking alcohol that day.

Based on all these circumstances, the officer had probable cause to believe the car contained additional contraband, and properly searched the vehicle under the automobile exception to the warrant requirement. The vehicle search and subsequent seizure of contraband were reasonable under the United States and North Dakota Constitutions, and the trial court

improperly suppressed the contraband seized through the vehicle during the search, including the methamphetamine, methamphetamine paraphernalia, and marijuana.

The defendant also claimed the contraband was illegally seized because it was not found until the second search of the vehicle, occurring after the officer failed to issue her a Miranda warning. The initial search, performed by another officer, revealed no contraband. The court concluded that this was inconsequential. Both searches were supported by the existence of probable cause and were valid under the automobile exception. An officer does not need separate findings of probable cause to support each search of the vehicle considering the searches were virtually contemporaneous. The officer's initial observations regarding the odor of alcohol and the age of the occupants of the vehicle supported each of the searches and subsequent seizure of the drug evidence. Even if a separate finding of probable cause was required for the second search, this was satisfied by the discovery of the defendant's necklace, which was a marijuana pipe emanating a marijuana smell.

The defendant also claimed the statements she made regarding the marijuana pipe necklace should have been suppressed, as well as subsequent evidence, because she was not given a proper Miranda warning prior to making those statements.

Whether the defendant was entitled to a Miranda warning depends on whether she was considered to be in police custody at the time of questioning. However, the court found it unnecessary to conduct this analysis for purposes of this case. Even if the court were to assume the defendant was in custody for Miranda purposes and there was no timely Miranda warning, suppression was inappropriate.

The court noted the United States Supreme Court in United States v. Patane, 124 S.Ct. 2620 (2004), stated that a Miranda violation does not require suppression of the physical fruits of the suspect's unwarned, but voluntary, statements. There was

no indication the defendant's statements were involuntary as examined under the standard for determining voluntariness. The trial court improperly suppressed evidence of the necklace.

The court did remand the matter to the trial court to determine when the defendant was in police custody for Miranda purposes, and to make further determination as to which statements, if any, should be suppressed. However, even if the unwarned statements could not be used as evidence to establish guilt, the physical fruits of the statements are admissible. The officer did not mention a Miranda warning until after all the drug evidence had been seized while driving the defendant to a detention center. The trial court found the defendant was under custodial interrogation almost immediately after the officer placed her in the patrol car, before either search of the vehicle. However, the fact that the officer may have had authority to arrest the defendant does not mean that she was in custody for purposes of Miranda. A person is not in custody for Miranda purposes merely because her freedom of movement is restrained by a police officer during a traffic stop. Persons temporarily detained pursuant to ordinary traffic stops are not in custody for purposes of Miranda. Traffic stops are brief, compared to lengthy stationhouse interrogations, and occur in the public view, an atmosphere far less police dominated than custodial interrogations at issue in Miranda.

The temporary detention of an individual in a traffic stop is more analogous to a Terry stop than to formal arrest and custody. During this temporary detention, a person is not in custody for Miranda purposes. During the second search of the vehicle, the officer informed the driver and the defendant that they were both under arrest. At that point, there was no doubt the defendant was in custody for Miranda purposes under the reasonable person standard. Any statements made after that point should be suppressed. However, the case was remanded to the trial court to determine the specific moment the defendant was in custody for Miranda purposes to determine which other statements should be suppressed.

ARREST - PROBABLE CAUSE

In *State v. Spidahl*, 2004 ND 168, ____ N.W.2d ____, the court affirmed the defendant's convictions for possession of a controlled substance and paraphernalia.

While patrolling, an officer noticed a vehicle that had been reported stolen several weeks earlier parked in front of a bar. He ran a check and confirmed the vehicle had been reported stolen. When two men got in the vehicle and began

driving away, the officer activated his overhead lights and stopped the vehicle.

While another officer questioned the driver, an officer asked the defendant, who had been a passenger, to get out of the vehicle. The defendant was then patted down, handcuffed, and placed under arrest for possession of a stolen vehicle. A subsequent search of the defendant produced three baggies of marijuana with residue and drug paraphernalia. The search of the vehicle uncovered two digital scales, a tin tray wrapped in a flannel shirt on the passenger seat, and two hand scales located in a compartment in the passenger side door of the vehicle. A search warrant was later issued for the defendant's home, and additional controlled substances and paraphernalia were found.

The defendant claimed he was unlawfully arrested because the officer lacked probable cause to believe he possessed a stolen vehicle. The defendant cited In Re J.D., 494 N.W.2d 160 (N.D. 1992) to support his claim that he had not exercised control over the vehicle in violation of N.D.C.C. §12.1-23-06 and, therefore, could not be guilty of the offense.

Rejecting this claim, the court stated that In re J.D. was not dispositive of this case. In that case, the court determined whether there was evidence to prove beyond a reasonable doubt that the juvenile

had exercised control over a vehicle. However, the degree of evidence needed to create probable cause to arrest, as applied by an officer in the field, is far less than reasonable doubt. The court declined to hold that, as a matter of law, a police officer lacks probable cause to believe a passenger in a stolen vehicle exercised authority, direction, or command over the vehicle.

In this case, the officer observed a vehicle which had been reported stolen several weeks earlier. It was late at night and the vehicle was parked in front of a bar. Two individuals entered the vehicle and began driving away. While the facts and circumstances known to the officer may not have been sufficient to establish beyond a reasonable doubt that the defendant had committed the crime of unauthorized use of a motor vehicle and supported a conviction, they were sufficient when viewed in the totality-of-the-circumstances to furnish a prudent person with reasonable grounds for believing a violation has occurred. Probable cause does not require that commission of the offense be established with absolute certainty or proven beyond a reasonable doubt. It may be, in fact, less than a preponderance of the evidence. Probable cause to arrest exists when the incremental facts and circumstances within the officer's knowledge and of which the officer has reasonably trustworthy information was sufficient to warrant a person of reasonable caution in believing an offense had been committed.

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